Dato' Seri Yusof bin Dato' Biji Sura @ Mohamad v BTM Timber Industries Sdn Bhd & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1218 OF 2006

B

TENGKU BAHARUDIN SHAH, ZALEHA ZAHARI AND ABDULL HAMID EMBONG JJCA

10 JULY 2009

C

Civil Procedure — Contempt of court — Committal proceedings — Breach of ex parte Anton Pillar order — Whether order too wide, vague and ambiguous to be enforced by committal

D

Civil Procedure — Judgments and orders — Anton Pillar order — Failure to comply with order — Whether order too wide, vague and ambiguous to be enforced by committal

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On 27 January 2006, the appellant had filed a petition to wind up the first respondent and alternatively for an order to compel one Dato' Sei Yong Tu Sang ('the second respondent') to buy up his shares in the first respondent. Thereafter the appellant had sought an ex parte Anton Pillar order ('the order') which was duly granted by the court. The order in effect required the respondents, inter alia, to allow the petitioner's representatives to enter the registered office and business premises of the first respondent and the registered office and business premises of the third respondent to search, inspect, photograph and deliver for safekeeping the documents listed in Schedule 1 annexed to the said order. The appellant alleged that when he and his representatives went to the registered office and business premises of the first and third respondents they were not allowed to enforce the order. The appellant therefore filed the present notice of motion for an order of committal against four persons, that is, the second respondent and three others representing the first and third respondents ('the alleged contemnors') as persons 'appearing to have control of the premises' who allegedly failed to allow the appellant's representatives to execute the order. The High Court judge was of the view that the terms of the order were ambiguous and impossible to be complied with and that the documents sought to be searched and inspected as listed in Schedule 1 to the order were too general and ambiguous for the purposes of committal. As such the High Court likened the order to have the effect of a fishing expedition and dismissed it with costs. Hence the present appeal wherein the appellant contended that

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A the alleged contemnors were persons 'appearing to have control' over the registered office and business premises of the first and third respondents within the context of the order.

B **Held**, dismissing the appeal with costs:

(1) The terms of the order itself must be looked at in order to define the obligations imposed by it. Upon doing so it was apparent that the High Court judge was clearly right in stating that the terms of the order were C vague and ambiguous and would not be enforced by committal, the rule being analogous to that which governs the interpretation of penal statutes (see paras 13–14).

(2) The High Court judge was also correct in his ruling that the phrase 'appearing to have control of the premises' in the order was vague and D could not be interpreted to include the alleged contemnors (see paras 14–15).

(3) In addition, the appellant had also failed to prove beyond reasonable doubt that the alleged contemnors had committed contempt as alleged. E This was because the documents listed in the Schedule annexed to the order were clearly too wide, vague and/or ambiguous in description as to make it practically impossible for the alleged contemnors to comply. In the circumstances the High Court judge was right to rule that the order obtained was in the nature of a fishing expedition which included F price sensitive information (see paras 15–16).

[Bahasa Malaysia summary

Pada 27 Januari 2006, perayu memfailkan petisyen untuk menggulungkan G responden pertama dan perintah secara alternatif untuk mendesak Dato' Sei Yong Tu Sang ('responden kedua') untuk membeli saham-sahamnya dalam responden pertama. Kemudiannya perayu menuntut perintah ex parte Anton Pillar ('perintah') yang dibenarkan oleh mahkamah. Perintah tersebut memerlukan responden-responden membenarkan wakil pempetisyen untuk H memasuki pejabat berdaftar dan premis-premis perniagaan responden ketiga untuk mencari, memeriksa, mengambil gambar dan mengambil dokumen-dokumen yang disenaraikan bagi tujuan penyimpanan seperti yang disenaraikan dalam Jadual 1 yang dikepilkan dengan perintah tersebut. Perayu menghujah bahawa apabila dia dan wakilnya pergi ke pejabat I berdaftar dan premis-premis perniagaan responden pertama dan ketiga, mereka tidak dibenarkan untuk menguatkuasakan perintah tersebut. Oleh itu perayu memfailkan notis usul ini untuk perintah komital terhadap empat individu, iaitu responden kedua dan tiga lagi yang lain mewakili responden-responden pertama dan ketiga ('penghina yang didakwa') sebagai

individu-individu yang 'appearing to have control of the premises' dihujahkan sebagai gagal membenarkan wakil-wakil perayu untuk melaksanakan perintah tersebut. Hakim Mahkamah Tinggi berpandangan bahawa terma-terma perintah tersebut adalah kabur dan mustahil untuk dipatuhi dan bahawa dokumen-dokumen yang dicari dan diperiksa sepertimana yang disenaraikan dalam Jadual 1 kepada perintah tersebut adalah terlalu umum dan kabur bagi tujuan komital. Oleh itu Mahkamah Tinggi menyamakan perintah tersebut mempunyai kesan seperti ekspedisi memancing dan menolaknya dengan kos. Oleh itu rayuan ini dibuat di mana perayu menghujah bahawa penghina-penghina yang didakwa merupakan individu-individu yang 'appearing to have control' terhadap pejabat berdaftar dan premis-premis perniagaan responden pertama dan ketiga dalam konteks perintah tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Terma-terma perintah tersebut perlu dikaji bagi mentafsirkan kewajipan-kewajipan yang dikenakan olehnya. Dengan melakukannya, adalah jelas bahawa hakim Mahkamah Tinggi betul dalam menyatakan terma-terma perintah adalah kabur dan tidak nyata dan tidak boleh dikuat kuasakan oleh komital, prinsip tersebut sama dengan tafsiran statut keseksaan (lihat perenggan 13–14).

(2) Hakim Mahkamah Tinggi juga betul dalam dapatannya bahawa frasa 'appearing to have control of the premises' dalam perintah tersebut adalah kabur dan tidak boleh ditafsirkan sebagai termasuk penghina-penghina yang didakwa (lihat perenggan 14–15).

(3) Sebagai tambahan, perayu juga gagal membuktikan tanpa keraguan munasabah bahawa penghina yang didakwa melakukan penghinaan seperti yang didakwa. Ini disebabkan dokumen-dokumen yang disenaraikan dalam Jadual yang dikepilkan kepada perintah adalah terlalu meluas, kabur dan/atau tidak jelas dalam perihalannya yang membuatkan penghina-penghina yang didakwa mustahil dapat mematuhinya. Dalam keadaan ini, hakim Mahkamah Tinggi betul dalam memutuskan bahawa perintah yang diperoleh bersifat seperti ekspedisi memancing di mana termasuk maklumat harga sensitif (lihat perenggan 15–16).]

Notes

For a case on Anton Pillar order, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4027.

For cases on committal proceedings, see 2(1) *Mallal's Digest* (4th Ed, 2007) paras 1767–1792.

Legislation referred to
Companies Act 1965 s 181
Rules of the High Court 1980 O 52 r 2(2)

Appeal from: Petition No D5–26–8 of 2006 (High Court, Kuala Lumpur)

Bastian P Vendargon (Khaled Abd Jalil and Wong Khen Yen with him) (Dennis Nik & Wong) for the appellant.
Mokhtar Ngah (Mokhtar Ngah & Co) for the respondents.

Zaleha Zahari JCA (delivering judgment of the court):

[1] Pursuant to leave obtained on 20 March 2006, the appellant filed notice of motion dated 29 March 2006 (encl 27) for an order for committal against four persons; Dato' Seri Yong Tu Sang, Yong Ellen, Chai Owi Yok as well as Yeang Khee Seng (jointly referred to as 'the alleged contemnors') for contempt of court whom the appellant alleged had failed to allow the appellant's representatives to execute an ex parte Anton Pillar order dated 16 February 2006 ('the said order').

[2] The High Court judge Kuala Lumpur on 20 November 2006 dismissed the appellant's application with costs. This appeal was dismissed with costs for the following reasons.

BACKGROUND

[3] The background facts are these. The petitioner had on 27 January 2006 filed Kuala Lumpur High Court Petition No D5–26–8 of 2006 against the BTM Timber Industries Sdn Bhd (BTM Timber, the first respondent in the petition) pursuant to s 181 of the Companies Act 1965 for an order to wind up BTM Timber; alternatively, for an order to compel Dato' Seri Yong Tu Sang, (the second respondent in the petition and named as the first alleged contemnor 'Yong') to buy up his shares in BTM Timber.

[4] This was followed by an ex parte summons in chambers filed on 3 February 2006 (Encl 5) by which application the appellant sought an ex parte Anton Pillar order which was duly granted by the court on 16 February 2006, the non-compliance of which is the subject matter of committal proceedings against the persons named for allegedly not complying with the said order when the appellant and his representatives sought to enforce the said order at the first and third respondent's registered and business offices on 20 February 2006.

[5] In contempt proceedings such as this, it is necessary to examine critically the precise nature and ambit of the order which the alleged contemnors is alleged to have been in breach of. For convenience of reference the English text of the said order is reproduced. It states as follows:

…

(2) That the Respondents do allow the Petitioner's representatives (numbering not more than four, including the Petitioner's Solicitors but excluding the supervising solicitor), together with an Advocate and Solicitor of the High Court of Malaya from the firm of Messrs Khairul Sofian Anuar & Co ('the 1st Supervising Solicitor'), to enter the registered office of the 1st Respondent situated at KM 33, Jalan Kuala Berang, 21800 Ajil, Hulu Terengganu, Terengganu Darul Iman ('the 1st Respondent's registered office') and any vehicles in the said premises so that they can search for, inspect, photograph and/or photocopy and deliver into the safekeeping of the Petitioner's Solicitors all the documents (original, duplicate or otherwise) and articles which are listed in Schedule 1 of the said Application herein or which the 1st Supervising Solicitor believes to be listed items. The Respondents must allow those persons to remain in the said 1st Respondent's registered office until the search is complete and if necessary to re-enter the said premises on the same or the following day or days in order to complete the search. This Order must be complied with either by the Respondents themselves or by the person appearing to be in control of the said 1st Respondent's registered office. This Order requires the Respondents or their Company Secretary, employees, agents and/or the persons appearing to be in control of the said registered office to permit entry to the said premises immediately upon the Order being served on them, except as stated in paragraph 6(d) below. The Respondents or their Company Secretary, employees, agents and/or the persons appearing to be in control of the said 1st Respondent's registered office must immediately inform the 1st Supervising Solicitor to the best of their knowledge where all the listed items in Schedule 1 can be found (whether, within or outside the said registered office) and must immediately hand over to the Petitioner's Solicitors any of the said listed items which are in his possession or under his control;

(3) That the Respondents do allow the Petitioner's representatives (numbering not more than four, including the Petitioner's Solicitors but excluding the supervising solicitor) together with an Advocate and Solicitor of the High Court of Malaya from the firm of Messrs Ong Ma & Partners ('the 2nd Supervising Solicitor'), to enter the business premises of the 1st Respondent situated at No 35, Jalan PJU 1/41, Dataran Prima, 47301 Petaling Jaya, Selangor Darul Ehsan

('the 1st Respondent's business premises') and any vehicles in the 1st Respondent's business premises so that they can search for, inspect, photograph and/or photocopy and deliver into the safekeeping of the Petitioner's Solicitors all the documents (original, duplicate or otherwise) and articles which are listed in Schedule 1 of the said Application herein or which the 2nd Supervising Solicitor believes to be listed items. The Respondents must allow those persons to remain in the said business premises until the search is complete and if necessary to re-enter the said business premises on the same or the following day or days in order to complete the search. This Order must be complied with either by the Respondents themselves or by the person appearing to be in control of the said business premises. This Order requires the Respondents or their Company Secretary, employees, agents and/or the person appearing to be in control of the said business premises to permit entry to the said business premises immediately upon the Order being served on them, except as stated in paragraph 6(d) below. The Respondents or their Company Secretary, employees, agents and/or the person appearing to be in control of the said business premises must immediately inform the 2nd Supervising Solicitor to the best of their knowledge where all the listed items in Schedule 1 can be found (whether within or outside the said business premises) and must immediately hand over to the Petitioner's Solicitors any of the said listed items which are in their possession or under their control;

(4) That the Respondents do allow the Petitioner's representatives (numbering not more than four, including the Petitioner's Solicitors but excluding the supervising solicitor) together with an Advocate and Solicitor of the High Court of Malaya from the firm of Messrs Ashvin Kulasingam ('the 3rd Supervising Solicitor'), to enter the registered address of the 3rd Respondent situated at 149A, Jalan Aminuddin Baki, Taman Tun Dr. Ismail, 60000 Kuala Lumpur ('the 3rd Respondent's registered address') and any vehicles in the 3rd Respondent's registered address so that they can search for, inspect, photograph and/or photocopy and deliver into the safekeeping of the Petitioner's Solicitors all the documents (original, duplicate or otherwise) and articles which are listed in Schedule 1 of the said Application herein or which the 3rd Supervising Solicitor believes to be listed items. The Respondents must allow those persons to remain at the 3rd Respondent's registered address until the search is complete and if necessary to re-enter the 3rd Respondent's registered address on the same or the following day or days in order to complete the search. This Order must be complied with either by the Respondents themselves or by the person appearing to be in control of the 3rd Respondent's registered address. This Order requires the 3rd

Respondent or their Company Secretary, employees, agents and/or the person appearing to be in control of the 3rd Respondent's registered address to permit entry to the 3rd Respondent's registered address immediately upon the Order being served on them, except as stated in paragraph 6(d) below. The Respondents or their Company Secretary, employees, agents and/or the person appearing to be in control of the 3rd Respondent's registered address must immediately inform the 3rd Supervising Solicitor to the best of their knowledge where all the listed items in Schedule 1 can be found (whether within or outside the 3rd Respondent's registered address) and must immediately hand over to the Petitioner's Solicitors any of the said listed items which are in their possession or under their control;

(5) That the Respondents do allow the Petitioner's representatives (numbering not more than four, including the Petitioner's Solicitors but excluding the supervising solicitor), together with an Advocate and Solicitor of the High Court of Malaya from the firm of Messrs Khairul Sofian Anuar & Co ('the 4th Supervising Solicitor'), to enter the business premises of the 3rd Respondent situated at Kawasan Perindustrian Wakaf Tapai, Batu 18, Jalan Kuala Berang, 21800 Ajil, Hulu Terengganu, Terengganu Darul Iman ('the 3rd Respondent's business premises') and any vehicles in the said premises so that they can search for, inspect, photograph and/or photocopy and deliver into the safekeeping of the Petitioner's Solicitors all the documents (original, duplicate or otherwise) and articles which are listed in Schedule 1 of the said Application herein or which the 4th Supervising Solicitor believes to be listed items. The Respondents must allow those persons to remain in the said business premises until the search is complete and if necessary to-reenter the said business premises on the same or the following day or days in order to complete the search. This Order must be complied with either by the Respondents (themselves or by the person appearing to be in control of the said business premises. This Order requires the Respondents or their Company Secretary, employees, agents and/or the persons appearing to be in control of the said business premises to permit entry to the said business premises immediately upon the Order being served on them, except as stated in paragraph 6(d) below. The Respondents or their Company Secretary, employees, agents and/or the persons appearing to be in control of the said business premises must immediately inform the 4th Supervising Solicitor to the best of their knowledge where all the listed items in Schedule 1 can be found (whether within or outside the said business premises) and must immediately hand over to the Petitioner's Solicitors any of the said listed items which are in his possession or under his control;

(6) That paragraphs (2), (3), (4) and (5) of this Order are each subject to the following:

(a) This Order may only be served between 9.00 am to 5.30 pm on a weekday and between 9.00 am to 1.00 pm on a Saturday. Once served, this Order may be executed any time between 9.00 am to 8.30 pm on a weekday and between 9.00 am to 4.00 pm on a Saturday;

(b) Paragraphs (2), (3), (4) and (5) of this Order must be carried out in the presence of the respective Supervising Solicitor and under his supervision;

(c) Once this Order has been served, no items may be removed from the said registered office and/or the said business premises ('the said premises') until a list of the items to be removed has been prepared by the Supervising Solicitor and a copy of the list has been supplied to the person served with the Order;

(d) Before permitting entry to the said premises, the Supervising Solicitor shall offer to explain to the person served with the Order its meaning and effect in everyday language and the Respondents or other person appearing to be in control of the said premises may seek legal advice, provided he does so at once. Whilst this is being done, he may refuse entry to the said premises for a short time (not to exceed 2 hours);

(e) If there are present or found within the said premises searched computers, whether portable computers or otherwise, the Respondents, the Company Secretary, their employees, their agents and/or any person appearing to be in control of the said premises must immediately give the Petitioner's Solicitors and the respective Supervising Solicitors effective access to the information in the computers with all necessary passwords, to enable them to be searched and if information relating to any of the listed items are found, the said computers containing the said information must be delivered to the Petitioner's Solicitors for safekeeping as evidence. If the Respondents, the Company Secretary, their employees, agents and/or any person appearing to be in control of the said premises fail, neglect or refuse to cooperate in giving effective access as aforesaid, the Petitioner's Solicitors and/or the Supervising Solicitors shall be entitled to remove the computers for retrieval of the information therein and thence for safekeeping thereof by the Petitioner's Solicitors;

(f) The Respondents, the Company Secretary, their employees, agents and/or any person appearing to be in control of the said premises

shall, if required by the Petitioner's Solicitors or the Supervising Solicitors, allow access to all areas within the said premises and shall unlock or open or cause to be unlocked or opened any doors, cabinets, cupboards or entrances leading to any area which is locked or closed and to unlock and open all vehicles within the relevant premises which are locked or closed.

(g) Except for the purpose of obtaining legal advice, each of the Respondents must not directly or indirectly whether by themselves, the Company Secretary, their servants or agents or otherwise inform anyone of these proceedings or of the contents of this Order, or warn anyone that proceedings have been brought against him by the Petitioner until the final disposal of the action herein; and

(h) The words where appropriate importing the 'singular' may be read as 'plural' and vice versa.

(7) The 2nd Respondent and/or the Company Secretary of the 1st and 3rd Respondents, their servants or agents or otherwise, shall forthwith deliver up or cause to be delivered up to the Petitioner's Solicitors any of the documents (original, duplicate or otherwise) and articles stated in Schedule 1 herein which are in their possession or under their control whether by themselves or by the said Company Secretary, their servants or agents or otherwise, and the Petitioner's Solicitors shall retain such documents and articles until the final disposal of the action herein upon the Petitioner's undertaking to abide by any Order the Court or Judge may make as to damages in case the Court or Judge should hereafter be of the opinion that any of the Respondents shall have sustained any loss or damage by reason of this Order which the Petitioner ought to pay;

(8) The proceedings in prayers (2), (3), (4) and (5) above may, as far as possible, be recorded with a video camera or video cameras;

(9) That the Petitioner shall be at liberty to use any information, documents or material obtained as a result of carrying out the Order for the purpose of these proceedings, and with leave of this Honourable Court in any other proceedings against, by or any of the Respondents other than this action;

(10) That the Respondents shall bear the costs of this application which shall be taxed and to be paid forthwith;

Schedule 1

(Listed items)

1st and 3rd Respondents

(a) Company's secretarial files;

(b) General Ledgers;

(c) Subsidiary ledgers;

(d) Payment vouchers and the supporting documents;

(e) Sales invoices;

(f) Sales journal;

(g) Journal vouchers;

(h) Bank statements and reconciliation;

(i) Cheque butts;

(j) Balance sheets and Profit and Loss Accounts;

(k) Audit and taxation working papers;

(l) Letters and correspondences;

(m) Facsimile and electronic mail messages;

(n) Minutes of meetings; and

(o) Any other relevant documents pertaining to this action.

[6] Supervising solicitors were also appointed by the court pursuant to the said order, and they each had prepared their respective report as to what transpired when the appellant and his representatives sought to enforce the said order on 20 February 2006 (exhs 'DSY4', 'DSY6' and 'DSY8' annexed to the affidavit of Dato' Seri Yusof bin Dato' Biji Sura @ Mohamad affirmed on 9 March 2006).

[7] In the statement filed pursuant to O 52 r 2(2) of the Rules of the High Court 1980 ('the Rules') the acts of contempt alleged to have been committed are as contained in paras 4–23 of the statement. The petitioner's complaint was this. When the appellant and his representatives went to BTM Timber's registered address to enforce the said order on 20 February 2006, the order was served on Ms Chai Owi Yok, the executive secretary and the administration and finance manager of BTM Timber, and after consultation with solicitors, the appellant's representatives were not allowed to enforce the order. Likewise when the appellant and his representatives sought to enforce the said order at BTM Timber's business premises and at Gimzan Plywood Sdn Bhd (the third respondent named in the petition, subsequently referred to as 'Gimzan') business premises on the same date (20 February 2006).

[8] A clerk (Miss Teng) accepted service of the said order and one 'Yong Ellen' appeared to be in control over BTM Timber's business premises. After an exchange of telephone conversation between the appellant's solicitors and Yong's solicitors, the appellant's representatives were not allowed to enforce the said order at the BTM's business premises.

[9] At Gimzan's business premises, Yeang Khee Seng, (Gimzan's general manager), upon being advised by their solicitors, did not accept service of the order, and the appellant's representatives were also not allowed to enforce the said order at Gimzan's business premises.

THE HIGH COURT JUDGE'S DECISION

[10] The judge was of the view upon examination of the 14 paged order that the terms of the said order were ambiguous and impossible to be complied with. He was of the view that the term, 'persons who appear to have control over the specified premises' as contained in the order was ambiguous for the purpose of enforcement, and for the purpose of contempt proceedings.

[11] He was also of the opinion that the documents listed in Schedule 1 annexed to the said order sought to be 'searched, inspected, photographed and delivered for safekeeping of the petitioner's solicitors' were too wide, vague and ambiguous as to make it practically impossible to comply. As to the documents described as, 'sale invoices, sales journal', these were price sensitive information. He was of the opinion that the effect of the order was that of a 'fishing expedition'. The documents listed in Schedule 1 was then ruled to be too general and ambiguous for the purposes of committal.

[12] He then concluded that there was no contemptuous breach of the said order. As the appellant had failed to prove beyond reasonable doubt that the alleged contemnors had committed the alleged acts of contempt, the appellant's application was then dismissed with costs.

DECISION

[13] The learned judge was clearly right in stating that an order will not be enforced by committal if its terms are vague or ambiguous, the rule being analogous to that which governs the interpretation of penal statutes. It is to the terms of the order itself that one must look in order to define the obligations imposed. See *Arlige, Eady & Smith on Contempt* (2nd Ed) paras 12–43 p 746:

A An order or undertaking will not be enforced by committal if its terms are ambiguous, the rule being analogous to that which governs the interpretation of penal statute. It is to the terms of the order itself that one must look in order to define the obligations imposed.

B **[14]** We are unable to accept the appellant's argument, that the persons who dealt with the supervising solicitors when the appellant attempted to enforce the said order, prima facie, are the 'persons appearing to have control' over the premises within the context of the said order. We are in agreement with the learned judge in ruling that the phrase 'appearing to have control of
C the premises' in the said order was vague.

[15] As to the documents listed in Schedule 1 of the said order sought to be 'searched, inspected, photographed and delivered for safekeeping of the appellant's solicitors', the items listed were clearly too wide, vague and/or
D ambiguous in description as to make it practically impossible for the alleged contemnors to comply. The said order clearly was open to abuse if the search, inspection and seizure of the documents of a competitor is to be allowed. Clause 2.1.4 of the said order permits the appellant to gain commercially upon sight of the same notwithstanding the objection of the person who was
E served with the order. The High Court judge was in the circumstances therefore not in error in ruling that the said order obtained was in the nature of a fishing expedition which includes price sensitive information.

F **[16]** The High Court judge was right in concluding that the appellant had failed to prove beyond reasonable doubt that the alleged contemnors had committed contempt as alleged.

[17] The appeal was accordingly dismissed with costs. The deposit to the
G respondents to account of taxed costs.

[18] My brothers, Justice Tengku Baharudin Shah and Justice Abdull Hamid, have seen this judgment in draft and have expressed their agreement with it.

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Appeal dismissed with costs.

Reported by Kohila Nesan

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